144

(3)

No. 09-301

Supreme Court, U.S.
FILED
NOV 5 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COMMON CAUSE OF PENNSYLVANIA, et al.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI BY RESPONDENTS LEADERS OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES – REPRESENTATIVE JOHN M. PERZEL, REPRESENTATIVE H. WILLIAM DEWEESE, REPRESENTATIVE SAMUEL H. SMITH, REPRESENTATIVE DAVID G. ARGALL, AND REPRESENTATIVE MICHAEL R. VEON, IN THEIR PERSONAL AND OFFICIAL CAPACITIES, AND THEIR SUCCESSORS IN LEADERSHIP, IN THEIR OFFICIAL CAPACITIES

JONATHAN F. BLOOM
Counsel of Record
THOMAS W. DYMEK
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098
(215) 564-8000

Counsel for Respondents Leaders of the Pennsylvania House of Representatives, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether petitioners lack standing to assert their claims where they allege abstract claims and generalized grievances that the Pennsylvania state government failed to observe the legislative process requirements of the Pennsylvania state constitution.

2. Whether principles of non-justiciability, including legislative immunity and other doctrines premised on state separation of powers principles, bar judicial review of state legislators' actions in enacting legislation.

3. Whether petitioners possess a constitutional right, under the Fifth or First Amendments, to any particular state legislative process.

4. Whether federal courts should dismiss or otherwise abstain from considering claims which are based solely on provisions of the Pennsylvania state constitution.

LIST OF PARTIES

The full List of Parties is as follows:

COMMON CAUSE OF PENNSYLVANIA, THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, REPRESENTATIVE GREG VITALI, TIM POTTS, CARL H. SILVERMAN, WILLIAM R. KOCH, and H. WILLIAM McINTYRE,

Petitioners,

and

COMMONWEALTH OF PENNSYLVANIA, GOVERNOR EDWARD G. RENDELL, TREASURER ROBERT P. CASEY, III, SENATOR ROBERT C. JUBELIRER, SPEAKER JOHN M. PERZEL, SENATOR ROBERT J. MELLOW, REPRESENTATIVE H. WILLIAM DeWEESE, SENATOR DAVID J. BRIGHTBILL, REPRESENTATIVE SAMUEL H. SMITH, REPRESENTATIVE DAVID G. ARGALL, REPRESENTATIVE MICHAEL R. VEON, and CHIEF JUSTICE RALPH J. CAPPY,

Respondents.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE	1
STATEMENT OF THE BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
CONCISE STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	9
A. The decision of the Court of Appeals is supported by well-settled law	9
B. The district court's dismissal of this case is supported by a constellation of alternative grounds	15
1. This case is moot	15
2. Federal courts lack jurisdiction over generalized attacks on state legislative processes	17
3. Even if petitioners had standing, they do not and cannot plead a substantive federal claim	18

TABLE OF CONTENTS – Continued

Page

a. Petitioners' § 1983 claims which are predicated on alleged state constitutional violations lack foundation 19

b. There is no due process right to a particular state legislative procedure 19

c. Petitioners have no First Amendment right to a particular state legislative procedure 22

4. Federal courts should not reach out to decide petitioners' state constitution-based claims 23

5. Petitioners' claims against the legislative parties are all barred by the doctrine of legislative immunity 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

American Foreign Service Association v. Garfinkel, 490 U.S. 153 (1989) 16

Barefoot v. City of Wilmington, 306 F.3d 113 (4th Cir. 2002) 20

Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) 17

Board of Regents of Cal. v. Roth, 408 U.S. 564 (1972) 20

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 24, 25

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) 23

Common Cause of Pa. v. Commonwealth, 447 F. Supp. 2d 415 (M.D. Pa. 2006) ..... *passim*

Common Cause of Pa. v. Commonwealth, 558 F.3d 249 (3d Cir. 2009) 8

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 11, 12, 14

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 23

Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) 13

Gregory v. Ashcroft, 501 U.S. 452 (1991) 18

Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937) 18

Kremens v. Bartley, 431 U.S. 119 (1977) 15

Lance v. Coffman, 549 U.S. 437 (2007) 10, 12, 14

TABLE OF AUTHORITIES – Continued

Page

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 11

Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) 22

New York v. United States, 505 U.S. 144 (1992) 18

O'Shea v. Littleton, 414 U.S. 488 (1974) 17

Rogin v. Bensalem Twp., 616 F.2d 680 (3d Cir. 1980) 17

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 13, 14

Stilp v. Commonwealth, 905 A.2d 918 (Pa. 2006) ..... *passim*

Town of Castle Rock, Colorado v. Gonzales, 545 U.S. 748 (2005) 20

United Mine Workers of Amer. v. Gibbs, 383 U.S. 715 (1966) 23

United States v. Richardson, 418 U.S. 166 (1974) 13

United States v. Will, 449 U.S. 200 (1980) 21

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464 (1982) 13, 14

Whitmore v. Arkansas, 495 U.S. 149 (1990) 10

Wilson v. New York, 1 Denio 595 (1845) 25

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 .....19, 24

Pa. Act of September 30, 1983, P.L. 160, No. 39.....2, 10, 12, 17

Pa. Act of July 7, 2005, P.L. 201, No. 44 .....*passim*

Pa. Act of November 16, 2005, P.L. 385, No. 72.....*passim*

Pa. Act of July 13, 2007, P.L. 92, No. 30 .....*passim*

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I.....3, 4

U.S. CONST. amend. XIV.....3

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

Respondents incorporate by reference petitioners' recitation of the opinions and orders below.

STATEMENT OF THE BASIS FOR JURISDICTION

Respondents incorporate by reference petitioners' statement of the basis for jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents incorporate by reference petitioners' recitation of the constitutional provisions involved in the case.

CONCISE STATEMENT OF THE CASE

The "facts" of this case are not – upon review of the actual pleadings involved – what petitioners present them to be.

On July 7, 2005, Pennsylvania House Bill 1521 was signed into law as Act 44 of 2005. That enactment provided for compensation increases for state public officials including Pennsylvania's legislators, judges and justices, and certain executive branch

officials. Act 44 repealed the then-existing compensation law, Act 39 of 1983 (the "Public Official Compensation Law"), to the extent inconsistent with the provisions of Act 44. Among its other provisions, Act 44 contained a non-severability clause which declared the Pennsylvania General Assembly's intent that the parts of Act 44 be treated together as inseparable. It stated that "[i]f any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Several months later, in reaction to a general public uproar about the compensation increases, on November 16, 2005, House Bill 1956 was enacted into law as Act 72 of 2005. Act 72 repealed Act 44 in its entirety, restoring the Public Official Compensation Law as the basis for state officials' compensation.

These enactments spawned numerous lawsuits – several in state court and this one in federal court – including actions challenging Act 44 itself, as well as actions challenging the repeal of Act 44 by Act 72. The Supreme Court of the Commonwealth of Pennsylvania consolidated the various related state court cases and, on September 14, 2006, the Pennsylvania high court issued a decision in the consolidated action, fully and finally resolving the constitutionality of both Act 44 and Act 72. *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006).

Petitioners are a group of various individuals and associations who disagreed with the policy decisions underlying the pay raises embodied in Act 44. Unlike

the litigants in the *Stilp* consolidated state court case, however, petitioners chose to use the federal court system in an attempt to try to invalidate Act 44. They filed the initial incarnation of their lawsuit on October 6, 2005, and a first amended complaint on October 31, 2005. Little more than two weeks after the filing of the first amended complaint, however, Act 44, and the public officials' pay raise it provided for, was repealed by Act 72. But petitioners persisted in their lawsuit, insisting on pleading a second amended complaint. In their second amended complaint petitioners added scores of new allegations, even continuing to seek the invalidation of Act 44 despite the fact that Act 44 had already been repealed. It is this second amended complaint which is the subject of the petition for writ of certiorari which respondents oppose.

The second amended complaint is laced with sordid, headline-grabbing – and entirely false – allegations about the process of the enactment of legislation in Pennsylvania. *See generally, Common Cause of Pa. v. Commonwealth*, 447 F. Supp. 2d 415 (M.D. Pa. 2006). Petitioners contend that a wide-ranging scheme in Pennsylvania state government led to an illegal legislative process which produced Act 44. More specifically, as summarized by the district court, petitioners allege:

> (1) a claim alleging conspiracy to violate [Appellants'] First and Fourteenth Amendment Rights, premised on the allegation that members of the General Assembly passed

> legislation favored by certain judges who in exchange rendered judicial opinions favorable to the legislature; (2) a claim that the General Assembly violated [Appellants'] due process rights to a "fair hearing before an impartial tribunal by including in Act 44 a non-severability clause;" (3) a claim that [Appellants'] due process rights were violated by [Appellees] engaging in "private conversations on legislative matters with one or more justices of the Pennsylvania Supreme Court that might come before the court;" (4) a claim that the "truncated legislative process" that was allegedly employed in enacting Act 44 represented a "continuing pattern of illegal statutory enactment" that violated [Appellants'] rights to due process and equal protection; (5) a claim that [Appellants'] First Amendment right to free speech was violated because they were allegedly prevented from lobbying their elected state representatives prior to passage of Act 44; (6) and eight pendent claims brought under the Pennsylvania Constitution.

Id. at 422. All of these various claims are founded on a contention that the legislative process that resulted in Act 44 violated some constitutional right. At its essence, however, petitioners' claims are just generalized grievances about the legislative process in Pennsylvania, assertions that they, as citizens, have some unspecified right to be involved in the legislative process and that they, a select group of citizens,

should be allowed to demand a different legislative process for the state.

Petitioners' second amended complaint named as defendants leaders in all three branches of Pennsylvania state government. In addition to naming the Commonwealth of Pennsylvania as a defendant, they named the governor; the then-state treasurer (now a United States Senator);[1] eight individual state senators and representatives;[2] and the then-chief justice of the state supreme court.[3] But petitioners did not stop there. They additionally spun a tale of other, unnamed, state supreme court justices from more than ten years ago engaging in secret negotiations and trading judicial votes for state legislative favors.

The district court rejected all of petitioners' claims on a variety of grounds including standing, mootness and a substantive failure to plead due process clause or equal protection clause violations, among others. As to standing, the district court had no trouble identifying, interpreting and applying this Court's prior cases. 447 F. Supp. 2d at 424-26 (citations omitted). The district court engaged in a lengthy

---

[1] Petitioners have since dropped the state treasurer as a party to this case.

[2] There are multiple errors in petitioners' attempt to identify the successors in office of many of the legislative leadership named in petitioners' original complaints.

[3] The Honorable Ralph J. Cappy was succeeded in office as Chief Justice of Pennsylvania by the Honorable Ronald D. Castille on January 14, 2008. Former Chief Justice Cappy passed away on May 1, 2009.

analysis of the standing of each plaintiff, demonstrating how none of them possessed standing to sue for specific, particularized violations of their own constitutional rights. *Id.* at 426-30. At the conclusion of its analysis, after illustrating the many deficiencies in petitioners' claims, the district court observed that "[f]or better or worse, the matters of which Plaintiffs complain belong to the political and electoral process." *Id.* at 437.

Then, while petitioners' case was pending on appeal to the Court of Appeals for the Third Circuit, the Pennsylvania state supreme court decided the consolidated *Stilp* case. In *Stilp*, the Pennsylvania Supreme Court, in a 100 page slip opinion, held, among other things, that although Act 72 could effectively repeal the compensation paid to members of the legislature and executive branches, Act 72's repeal was ineffective to repeal the pay raise provided to members of the state judiciary. 905 A.2d at 946-48. The different treatment for members of the judiciary stemmed from a specific provision of the Pennsylvania constitution that prohibits reductions in judicial pay (with certain exceptions that do not apply here). *Id.* In July 2007, still while this appeal was pending, the saga of Act 44 took another turn. The Pennsylvania legislature enacted and the governor signed Act 30 of 2007 ("Act 30"). In general, Act 30 provided for (i) a $1 pay raise for all members of the state judiciary on top of the Act 44 pay increases, and (ii) a new formula for

future cost-of-living increases to this compensation.[4] Act 30 effectively repealed that narrow part of Act 44 which had been revived by the Pennsylvania Supreme Court in its *Stilp* decision by retaining the judicial pay increase in accordance with the *Stilp* decision and adding one dollar. Importantly for this case, Section 3 of Act 30 repealed both Act 44 and Act 72 in their entireties.

Eighteen months after the Pennsylvania state supreme court decided the pay raise issues in *Stilp*, in this federal case an inter-circuit panel[5] of the Court of Appeals unequivocally affirmed the district court's dismissal of petitioners' second amended complaint on standing grounds:

> Clearly these allegations, which challenge the legislative process, are insufficient to allege more than a generalized, abstract grievance, shared by all Pennsylvania citizens. The complaint does not attempt to identify an actual, concrete injury that this conduct caused any of the named Plaintiffs.

---

[4] Act 44's cost-of-living formula linked future pay raises for Pennsylvania's judges to future pay raises given by Congress to federal judges. Act 30's cost-of-living formula decoupled Pennsylvania's compensation scheme from future federal raises.

[5] The entire roster of judges for the Court of Appeals for the Third Circuit recused themselves from consideration of this appeal, presumably because one of their members, the Honorable Marjorie O. Rendell, is the spouse of the governor of Pennsylvania, Edward G. Rendell, who was named as a defendant in both his official and personal capacities.

Common Cause of Pa. v. Commonwealth, 558 F.3d 249, 262 (3d Cir. 2009) (citation omitted). Petitioners now try to advance their sensationalistic claims one more step. But no matter how startling their allegations may appear, or supposedly egregious the alleged conduct of the various respondents, this lawsuit flies in the face of well-settled law on standing.

SUMMARY OF ARGUMENT

This lawsuit is nothing more than a generalized expression of petitioners' displeasure about how a state runs its own government. It does not involve a murky area of undeveloped federal law; it does not involve any split in the Circuits. Indeed, petitioners' complaints, as the district court observed, do not belong in court at all, but rather in the political arena. As such, the district court correctly dismissed petitioners' claims for lack of standing because petitioners did not and cannot demonstrate the kind of particularized, concrete interest required to support a lawsuit in federal court. The decision by the Court of Appeals to affirm the dismissal further reinforced the district court's appropriate application of this Court's well-settled law on standing.

Even if petitioners had standing to proceed, however, a host of other issues would foreclose petitioners' action and further complicate an appeal. Some, but not all, of these points were explained in the district court's opinion as alternative grounds for dismissal.

For example, the action is moot because the state legislation petitioners seek to overturn has been completely repealed by subsequent state legislation. Additionally, petitioners failed to state any federal causes of action and a federal court should not be used to decide important issues of Pennsylvania state constitutional law involving the process of enactment of state legislation by Pennsylvania's legislature. And other threshold doctrines – non-justiciability and legislative immunity – support the dismissal of all claims against the Pennsylvania legislators as well.

In short, petitioners offer allegations apparently designed for consumption by the media. But once corralled by actual facts and well-settled law, petitioners' allegations prove to be nothing but a paper tiger – toothless in reality.

ARGUMENT

A. The decision of the Court of Appeals is supported by well-settled law.

Petitioners lack standing under long-standing, well-settled legal principles. What petitioners term as the confusing "generalized grievance doctrine" is really just a complaint about the firmly established, bedrock principle of federal standing: In order to have standing for their federal claims and state law claims, petitioners must show "injury in fact." This means that petitioners must have a "concrete" harm that is "distinct and palpable, as opposed to merely

abstract." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal citations omitted). Notwithstanding whatever amendments petitioners may have made to their original action, petitioners here just do not possess the required particularized, concrete interests to have standing in federal court, as both the district court and the Court of Appeals ruled.

The law regarding standing that petitioners urge this Court to revisit is not only well-settled among and uniformly applied by the Circuits, but it is certainly well-settled by this Court. Just two years ago, in *Lance v. Coffman*, 549 U.S. 437 (2007), this Court rejected on standing grounds an effort by four private citizens to bring an action in federal court to challenge the outcome of a separate case where the Colorado Supreme Court had issued a ruling striking down a redistricting plan passed by the Colorado legislature. This Court started from the axiom that "[f]ederal courts must determine that they have jurisdiction before proceeding to the merits." *Id.* at 439 (citation omitted). Jurisdiction is limited to cases and controversies, and "[o]ne component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Id.* (citation omitted). The Court concluded that the plaintiffs lacked standing:

> [Plaintiffs] filed a complaint alleging that "Article V, §44 of the Colorado Constitution, as interpreted in *Salazar*, violated [the Elections Clause] of the U.S. Constitution by

> depriving the state legislature of its responsibility to draw congressional districts." In light of the discussion above, *the problem with this allegation should be obvious: The only injury plaintiffs allege is that the law – specifically the Elections Clause – has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.* It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing. Because plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim.

Id. at 441-42 (emphasis added; internal citations omitted; alterations added and in original). The Court emphasized that "[w]e have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Further, three years ago, this Court addressed the issue of standing in a case where city and state taxpayers sought to challenge local property tax abatements and investment tax credits granted to an automobile manufacturer in *DaimlerChrysler Corp. v.*

Cuno, 547 U.S. 332 (2006), *rehearing denied*, *Wilkins v. Cuno*, 548 U.S. 920 (2006). The Court determined that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 333 (citation omitted). The Court explained that standing must be rejected where a generalized taxpayer complaint is not "concrete and particularized" but rather recites a grievance that the plaintiffs "suffer in some indefinite way in common with people generally[.]" *Id.* at 344 (citations omitted). Where standing is lacking, the Court held that it cannot adjudicate the matter, even if confronted with an "important question of constitutional law" as in *DaimlerChrysler*. *Id.* at 342 (citation omitted).

In *Lance*, this Court observed that its "refusal to serve as a forum for generalized grievances has a lengthy pedigree." *Id.* at 439. Indeed, this Court has long rejected the broad argument for standing advanced by petitioners here. Twenty years ago, in an opinion also relied upon in *DaimlerChrysler*, this Court explained:

> Although [respondents] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged Constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in

> Constitutional terms. It is evident that respondents are firmly committed to [vindicating Constitutional principles], but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 485-86 (1982) (emphasis in original). This Court has repeatedly held that an abstract claim that the government has failed to observe the Constitution does not confer standing, as "[s]uch claims amount to little more than attempts 'to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Valley Forge Christian Coll.*, 454 U.S. at 483 (citation omitted); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998) ("where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."); *United States v. Richardson*, 418 U.S. 166, 176-77 (1974) (dismissing claim that the government's failure to disclose certain CIA expenditures violated the Constitution's Accounts Clause as a "generalized grievance" that is "plainly undifferentiated and 'common to all members of the public.'").

Strict adherence to standing principles as pronounced by this Court in *Lance*, *DaimlerChrysler*, *Valley Forge Christian Coll.* and innumerable other cases, and the rejection of standing based on "generalized grievances" common to all citizens, is well-established jurisprudence of this Court and all of the Circuits. Both the district court and Court of Appeals had no trouble applying this Court's prior rulings to reject petitioners' assertions of standing. As this Court declared, in an opinion that figured prominently in the decisions of both the district court and Court of Appeals, "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries." *Valley Forge Christian Coll.*, 454 U.S. at 485 (quoting *Schlesinger*, 418 U.S. at 227). Here, petitioners allege that a state government failed to follow appropriate procedures in the state legislative process surrounding the enactment of Act 44. That is not "harm" felt in any particularized, concrete way by petitioners. Rather, petitioners are trying to use this federal forum as an avenue to redress generalized grievances against the state government. Petitioners' complaints are simply the sort of "generalized grievances" that do not support standing in federal court, as this Court has consistently ruled.

B. The district court's dismissal of this case is supported by a constellation of alternative grounds.

Separate and apart from petitioners' lack of standing, their lawsuit and any possible adjudication before a federal court suffers from numerous other fatal flaws: (1) the relief petitioners seek has already been accomplished by subsequent state legislation, so their case is moot; (2) federal courts lack jurisdiction over generalized challenges to state legislative processes; (3) petitioners do not adequately plead any federal causes of action; (4) federal courts should abstain from deciding the state constitutional issues presented; and (5) the federal claims against members of the Pennsylvania General Assembly are all barred by the doctrine of legislative immunity (and the state claims are barred by the Pennsylvania Constitution's Speech or Debate Clause).

1. This case is moot.

While the twisting state legislative history involved in this matter may be uniquely complex, the legal precept involved is not: Where a statute is challenged as unconstitutional and that statute is later repealed, any judicial consideration of its constitutionality is moot. *See, e.g., Kremens v. Bartley*, 431 U.S. 119, 134 (1977). Any current lawsuit challenging any aspect of the now-repealed Act 44, therefore, must be dismissed as moot. Such a result would be consistent with the well-established principle that courts should refrain from issuing unnecessary constitutional

rulings. *See, e.g., American Foreign Service Association v. Garfinkel*, 490 U.S. 153, 161 (1989) ("[W]here, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.").

Here, petitioners' entire lawsuit is an attempt to invalidate Act 44. Petitioners, various individuals and associations who disagreed with the policy decisions embodied in Act 44, filed the initial incarnation of their lawsuit on October 6, 2005, and a first amended complaint on October 31, 2005. Afterwards, however, Act 72 repealed Act 44 in its entirety. Petitioners nonetheless persisted in their lawsuit – insisting on pleading a second amended complaint, which continued to seek the invalidation of Act 44 even though it had already been repealed. But now, following the *Stilp* decisions, Act 44 has been completely and entirely repealed by Act 30. Even if they had standing to do so, there is just nothing left for petitioners to argue about here and now in this federal forum. Petitioners seek something by judicial act that they have already received by legislative repeal – the complete invalidation of Act 44. To continue would present a quintessential example of a moot case.

2. Federal courts lack jurisdiction over generalized attacks on state legislative processes.

The federal courts lack jurisdiction over this matter for an even more fundamental reason as well. Petitioners seem to believe that a handful of unelected citizens have a right to come to federal court to challenge the means and manner in which a democratically-elected state government enacts laws applicable to all of its citizens. Our representative system of government does not tolerate such an attempted circumvention of the people's will by a disgruntled few. *See Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole."); *see also O'Shea v. Littleton*, 414 U.S. 488, 494-99 (1974) (no case or controversy presented where plaintiffs alleged generalized constitutional grievances). Moreover, the arrangement suggested by petitioners would stand representative form of government on its head by plucking decision-making authority from the ballot box and dropping it into a federal courtroom. *See Rogin v. Bensalem Twp.*, 616 F.2d 680, 693-94 (3d Cir. 1980) ("the general theory of republican government is . . . through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful

to the public will"); *cf. New York v. United States*, 505 U.S. 144, 181 (1992) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front"); *Gregory v. Ashcroft*, 501 U.S. 452, 457-60 (1991) (constitutional system of federalism creates a federal government of limited powers and recognizes states have indestructible sovereignty).

No unelected group of individuals can force a federal court to become a vehicle in the federalized oversight of internal state affairs. *See Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). For this reason, petitioners' action cannot proceed in federal court.

3. Even if petitioners had standing, they do not and cannot plead a substantive federal claim.

Although the district court held, and the Court of Appeals agreed, that petitioners lacked standing to proceed, the district court also held that petitioners have not stated and, as a matter of law, cannot state a cognizable federal claim:

> Even were one or more Plaintiffs able to modify their claims to allege individualized harm, they must state a cognizable constitutional claim that would entitle them to relief. No Plaintiff has done so here.

Common Cause of Pa., 447 F. Supp. 2d at 430. When drawn away from the fog of political rhetoric and put under the light of legal examination, it becomes clear that petitioners' legal theories for their federal claims have no basis in law.

a. Petitioners' § 1983 claims which are predicated on alleged state constitutional violations lack foundation.

Petitioners' claims under 42 U.S.C. § 1983 – all of which decry the legislative procedure through which Act 44 was enacted – are predicated on alleged violations of the procedural requirements of the Pennsylvania Constitution. But because the Pennsylvania state supreme court in *Stilp* already definitively ruled that the Pennsylvania legislature complied with all of the procedural requirements of the Pennsylvania Constitution, petitioners' § 1983 claims are without foundation. *Stilp*, 905 A.2d at 951-59.

b. There is no due process right to a particular state legislative procedure.

Petitioners also purport to bring claims under § 1983 for alleged due process violations based on the manner and procedure in which Act 44 was enacted by the Pennsylvania legislature. Petitioners, however, cannot establish that they have a constitutionally protected property interest in the legislative process. Even more, the conduct alleged is not in any way violative of due process.

To establish a due process violation, a litigant must, as a threshold matter, demonstrate a constitutionally protected property interest or benefit. *See Board of Regents of Cal. v. Roth*, 408 U.S. 564, 577 (1972). The procedural component of the due process clause does not protect everything that might be described as an interest or benefit. *See Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756 (2005) (citation omitted). To have a property interest in a benefit, a person clearly must have more than an "abstract need or desire." *Id.* He or she must have a "legitimate claim of entitlement to it." *Id.* With these standards in mind, it is obvious that petitioners' federal claims are insufficient:

- Members of the public do not have a constitutionally recognized liberty or property interest in the manner or procedure in which state legislation is passed. As the district court noted, "It is black letter law that there is no actionable constitutional right to due process in the manner in which legislation affecting a broad class of society is enacted." *Common Cause of Pa.*, 447 F. Supp. 2d at 432 (quoting *Barefoot v. City of Wilmington*, 306 F.3d 113, 124 (4th Cir. 2002) ("'When a legislature passes a law which affects a general class of persons, the political process provides all the process that is due.'")).

- There is nothing inherently unconstitutional about legislation containing a

non-severability provision. Even so, the Pennsylvania state supreme court did not enforce Act 44's non-severability clause. *Stilp*, 905 A.2d at 980.

- With regard to whether Act 44 created a conflict of interest for the state supreme court because the legislation involved judicial pay increases, such an argument ignores the application of the "rule of necessity" which allows a court to rule on an issue before it, even in the presence of a conflict of interest, if there is no other viable tribunal. *Stilp*, 905 A.2d at 557-58 (citations omitted). In fact, the rule of necessity has been applied by this Court to allow a court to rule on the propriety of judicial compensation as well. *United States v. Will*, 449 U.S. 200, 213 (1980).

- Finally, there is no support for petitioners' position that members of the Pennsylvania judiciary cannot discuss their compensation with the members of the Pennsylvania legislature. There is nothing inherently unconstitutional about members of the judiciary becoming involved in matters which affect the business of the courts. In fact, the Chief Justice of the United States Supreme Court has spoken publicly about federal judicial compensation and has urged that salaries for federal judges be increased in a meaningful way.

While petitioners implore this Court to adopt a new, expanded version of standing, the underlying federal claims they mean to advance are empty.

c. Petitioners have no First Amendment right to a particular state legislative procedure.

Petitioners also allege that the relatively quick passage of Act 44 violated their First Amendment right to petition government, the apparent theory being that the Pennsylvania General Assembly was somehow required to move at a slower speed to ensure petitioners had whatever opportunity they deemed appropriate to generate and then voice their opposition to particular legislation. In making this argument, petitioners simply misconstrue the First Amendment. As the district court observed with regard to this First Amendment claim, "it is settled law that no such right exists." *Common Cause of Pa.*, 447 F. Supp. 2d at 434 (citing *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984)). While the members of the Pennsylvania General Assembly, like other legislators, routinely listen to and respond to their constituents, this responsiveness is an aspect of these legislators' good leadership not an abstract federal constitutional right.

4. Federal courts should not reach out to decide petitioners' state constitution-based claims.

A federal court exercising supplemental jurisdiction over related state law claims applies state substantive law to those claims (while applying federal law to the federal claims). *See United Mine Workers of Amer. v. Gibbs*, 383 U.S. 715, 726 (1966) (finding that a federal court exercising supplemental jurisdiction must apply state law to state claims) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Here, no federal court need labor hard to determine how the Pennsylvania supreme court would resolve the Pennsylvania state constitutional issues in this case because it has already done so. *See Stilp*, 905 A.2d at 951-70. In relevant part, the state supreme court in *Stilp* decided that the same state constitution-based procedural claims as advanced by petitioners here in federal court lacked merit. *Id.* at 951-60. The ruling of the state's highest court on the state law issues raised again here in federal court is controlling law. *See Erie*, 304 U.S. at 78. Alternatively, the district court could have abstained from deciding the state constitutional law issues and declined to exercise supplemental jurisdiction over these pendent state law claims. *See, generally, Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

It is also worth noting here that although petitioners make heated assertions that the Pennsylvania supreme court was somehow stacked against any prospective challenge that petitioners might have

mounted against Act 44 in state court, reality betrays their rhetoric. Petitioners cynically reason that because Act 44 increased compensation for the members of the Pennsylvania supreme court and included a non-severability clause (so that if the members of the court were to strike down the legislative, executive and judicial pay raises embodied in Act 44, they would effectively cut their own salaries), the state supreme court would uphold Act 44. But in its *Stilp* decision, the state supreme court found that the very non-severability provision at the root of petitioners' concerns was itself unconstitutional and refused to enforce it. *See* 905 A.2d at 970-81.

5. Petitioners' claims against the legislative parties are all barred by the doctrine of legislative immunity.

Under the guise of § 1983, petitioners impermissibly seek to embroil the federal judiciary in the inner workings of a state legislature by alleging that the procedure and manner in which the Pennsylvania General Assembly debated, deliberated and enacted Act 44 amounts to a violation of petitioners' federal constitutional rights. Such claims against state legislators cannot stand. This Court has unequivocally held that state legislators are entitled to "absolute immunity" from suit under § 1983 for their legislative activities. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998).

While petitioners take issue with the manner in which the state legislature conducted itself, that does not make the conduct of those state legislators any less legislative in nature. As this Court explained in *Bogan*:

> [W]hen a local legislator exercises discretionary powers, he "is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done."

523 U.S. at 50 (citing *Wilson v. New York*, 1 Denio 595, 599 (1845)). Accordingly, petitioners' claims against the Pennsylvania state legislators suffer from the infirmity of being barred by the doctrine of legislative immunity.

CONCLUSION

For all of the foregoing reasons, respondents therefore request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

JONATHAN F. BLOOM
THOMAS W. DYMEK
STRADLEY RONON STEVENS & YOUNG, LLP
2600 One Commerce Square
Philadelphia, PA 19103-7098
(215) 564-8000 (phone)
(215) 564-8120 (fax)

Counsel for Respondents Leaders of the Pennsylvania House of Representatives – Representative John M. Perzel, Representative H. William DeWeese, Representative Samuel H. Smith, Representative David G. Argall, and Representative Michael R. Veon, in their personal capacities and official capacities, and their successors in leadership, in their official capacities

Dated: November 5, 2009